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18 Counsel for Plaintiff and the Proposed Class

19 UNITED STATES DISTRICT COURT
20
21 CENTRAL DISTRICT OF CALIFORNIA
22
23 WESTERN DIVISION

24 NICOLAS TORRENT, on Behalf of
25 Himself and All Others Similarly
26 Situated,

27 Plaintiff,

28 vs.

YAKULT U.S.A. INC.,

Defendant.

Case No:

Pleading Type: Class Action

**CLASS ACTION COMPLAINT
AND DEMAND FOR JURY
TRIAL**

1 Plaintiff, Nicolas Torrent (“Plaintiff”), through his undersigned attorneys,
2 upon personal knowledge as to his own acts, and on information and belief as to all
3 others based upon his own and his attorneys’ investigation, alleges as follows:

4 NATURE OF THE ACTION

5 1. Defendant, Yakult U.S.A. Inc. (“Defendant”) manufactures, markets,
6 distributes, and sell probiotic beverages called Yakult and Yakult Light
7 (collectively, “Yakult”) which contain a live microorganism named *Lactobacillus*
8 *casei* Shirota. Defendant claims this probiotic culture is beneficial to human health
9 and helps balance the digestive system. These claims are contrary to the weight of
10 scientific evidence. Plaintiff and members of the proposed class were injured
11 when they bought Yakult in reliance on these false and misleading claims. As
12 such, Plaintiff seeks relief in this action individually and as a class action on behalf
13 of all purchasers in the United States of Defendant’s Yakult (the “Class”). Plaintiff
14 also seeks relief in this action individually and as a class action on behalf of a
15 subclass of all purchasers in California of Defendant’s Yakult (the “California
16 Class”).

17 JURISDICTION AND VENUE

18 2. This Court has original jurisdiction under 28 U.S.C. § 1332(d)(2) (the
19 Class Action Fairness Act) because the matter in controversy exceeds the sum or
20 value of \$5 million, exclusive of interest and costs, and there is diversity of
21 citizenship between the proposed class members and Defendant.

22 3. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because
23 Plaintiff and Defendant reside in this District; many of the acts and transactions
24 giving rise to this action occurred in this District; and Defendant (1) is authorized
25 to conduct business in this District and has intentionally availed themselves of the
26 laws and markets of this District through the promotion, marketing, distribution,
27 and sale of Yakult in this District; and (2) is subject to personal jurisdiction in this
28 District.

PARTIES

4. Defendant Yakult U.S.A. Inc. is a Delaware corporation with its principal place of business located at 17235 Newhope St. Fountain Valley, California 92708.

5. Defendant manufactures, markets, distributes, and sells Yakult in the United States, and have done so throughout the Class Period as defined herein.

6. Plaintiff is a resident of Los Angeles, California. He purchased Yakult during the class period (as defined herein) in reliance on Defendant's false and misleading packaging and advertising claims, as described further herein.

FACTUAL ALLEGATIONS

7. This class action concerns the probiotic drink Yakult, the packaging of which is depicted below.



Yakult Nutrition Facts

Yakult is a delicious refreshing drink for everyone. Created in Japan in 1935 by our founder, microbiologist Dr. Minoru Shirota, each bottle of Yakult contains around 8 billion live and active beneficial cultures called *Lactobacillus casei Shirota*. Drink one or two bottles daily to help balance your digestive system and maintain overall health. Enjoy with any meal or anytime throughout the day. Keep refrigerated.

Do not use product if seal or bottle is broken. Completely remove foil top before drinking. This is labeled as a multi pack product, bottles not to be sold individually.

Manufactured by Yakult S.A. DE C.V., Mexico City, Mexico
Imported by Yakult U.S.A. Inc., Torrance, CA 90503

Yakult

www.yakultusa.com



Dairy Beverage

Nutrition Facts

Serving Size 1 bottle (80ml) 2.7oz
Servings Per Package 5

Amount Per Serving

Calories 50

% Daily Value*

Total Fat 0g 0%

Sodium 20mg 1%

Total Carbohydrate 12g 4%

Dietary Fiber 0g 0%

Sugars 11g

Protein 1g

Calcium 2%

Not a significant source of saturated fat, trans fat, cholesterol, vitamin A, vitamin C, iron and calories from fat.

*Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs:

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Saturated Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

Calories per gram
Fat 9 • Carbohydrate 4 • Protein 4

INGREDIENTS: WATER, SUGAR, SKIM MILK POWDER, GLUCOSE, NATURAL AND ARTIFICIAL FLAVORS, LACTOBACILLUS CASEI SHIROTA

0g Fat, 0mg Cholesterol, No Preservatives. No Gluten.

8. Yakult was originally introduced in Japan in 1935. Its name derives from the word for yogurt in the Esperanto language. Today, according to Defendants' website (www.yakultusa.com), Yakult is the world's leading probiotic beverage.

9. Probiotics are live microorganisms claimed to be beneficial to the host organism. According to the Food and Agriculture Organization of the United Nations (FAO) and World Health Organization (WHO), probiotics are defined as: "Live microorganisms which when administered in adequate amounts confer a health benefit on the host."¹

¹ Report of a Joint FAO/WHO Expert Consultation on Evaluation of Health and Nutritional Properties of Probiotics in Food Including Powder Milk with Live Lactic Acid Bacteria (October 2001).

1 10. The product's packaging states that "each bottle of Yakult contains
2 around 8 billion live and active beneficial cultures called *Lactobacillus casei*
3 Shirota."

4 11. According to Defendant's website, *Lactobacillus casei* Shirota is a
5 probiotic strain first cultured in the 1930s by microbiologist Dr. Minura Shirota at
6 the Medical School of Kyoto University. The strain was named in his honor, and
7 Dr. Shirota went on to incorporate it into a drink for the Japanese market, which
8 became Yakult.

9 12. Today, Yakult is sold in 31 countries, although the bacteria cultures
10 are provided from a mother strain from Japan regardless of where the product is
11 ultimately manufactured or distributed.

12 13. Yakult first entered the United States market in 1999 on the shelves of
13 Asian grocery stores.

14 14. In 2007, Yakult first became available for sale in general market
15 grocery stores in the United States.

16 15. The marketing of Yakult in the United States places heavy emphasis
17 on the health benefits of *Lactobacillus casei* Shirota. For example, the packaging
18 prominently encourages consumers that, "[d]rinking one or two bottles daily" can
19 "balance your digestive system and maintain overall health."

20 16. Defendant's website oriented to the United States market contains
21 numerous statements touting the product's health benefits, such as:

22
23 How does Yakult work?

24
25 Yakult is a probiotic; it contains billions of live and active "good
26 bacteria." Your digestive system naturally contains trillions of all
27 kinds of bacteria -- some are helpful, some are harmful. When you
28 drink Yakult daily, it makes it difficult for the bad bacteria to take

1 over. Yakult also gives you more of the good bacteria that may help
2 balance your digestive system.

3 [\(http://www.yakultusa.com/#faq\)](http://www.yakultusa.com/#faq)
4

5 Why drink Yakult?

6
7 You may not think about your digestive system when you think about
8 your overall well-being, but that's where good health and proper
9 nutrition begins. Drinking Yakult daily may help balance your
10 digestive system. For 75 years, people around the world have been
11 making Yakult a part of their daily diet – now you can, too!

12
13 On top of all the benefits Yakult tastes great! Over 28 million children
14 and adults around the world enjoy the delicious citrus taste of Yakult
15 every day.

16
17 [\(http://www.yakultusa.com/#faq\)](http://www.yakultusa.com/#faq)

18 17. Yakult is also advertised on television. One ad depicts individuals of
19 varying ages enjoying the drink while the narrator intones, “With the exclusive
20 probiotic *Lactobacillus casei* Shirota, Yakult may help balance your digestive
21 system and support overall health. Yakult. Good health begins inside.”

22 18. Another ad shows a family of four drinking Yakult together in the
23 kitchen. The narrator states:

24 Today’s busy and stressful lifestyle, irregular diet, and aging can lead
25 to an unbalanced digestive system. That’s why there’s Yakult, the
26 delicious probiotic drink that packs good things into a small package.
27 Created over 70 years ago, Yakult’s exclusive *Lactobacillus casei*
28 Shirota helps maintain the balance of your digestive system. Millions

1 of families around the world enjoy the benefits of drinking Yakult
2 every day, and now you can too. Introducing Yakult. Every Day.
3 For Every Body.

4 19. Another ad is a whimsical animation depicting the invention and
5 distribution of Yakult around the world, as the narrator states:

6 Once upon a time a microbiologist named Dr. Shirota shared his discovery
7 with the world. It was a unique strain of probiotic bacteria named
8 *Lactobacillus casei* Shirota which he used to create Yakult in support of
9 good health. Now millions of families, from East to West, balance their
10 digestive systems with Yakult. Here's to you, Dr. Shirota!

11
12 20. Defendant's advertising claims about Yakult are and have been the
13 subject of an extensive and comprehensive, nationwide marketing campaign from
14 2007 to the present and continuing.

15 21. Yakult is sold in packs of five bottles, each holding 2.7 ounces of
16 product. A five-pack typically retails for approximately \$3.60.

17 22. Defendant's emphasis on Yakult's purported health benefits has
18 enabled them to command a substantial premium in comparison to competing
19 yogurt drinks that do not contain probiotics, or the *Lactobacillus casei* Shirota
20 strain.

21 23. Defendant's labeling and advertising claims are false and deceptive
22 because they imply that Yakult is healthier than other, less costly beverages that do
23 not contain probiotics or the *Lactobacillus casei* Shirota strain, and because they
24 imply that Yakult makes a more significant contribution to digestive health than it
25 actually does.

26 24. There is no credible scientific evidence that the probiotics in Yakult
27 do anything to promote digestive health or human health more generally.
28

25. For example, in 2010 a scientific panel of the European Food Safety Authority (EFSA) published an opinion on the health benefits of *Lactobacillus casei* Shirota. The EFSA panel concluded based on the available evidence that, contrary to claims advanced by one of Yakult Honsha's European subsidiaries, "a cause and effect relationship has not been established" between consumption of the probiotic and maintenance of immune defenses.²

26. In a separate study, the EFSA also concluded that general claims regarding probiotics' salutary effect on the immune system and digestive health lack sound scientific basis. As the United Kingdom-based newspaper *The Guardian* reported, the EFSA concluded that the evidence submitted by the probiotics industry "to support its claims that various food additives could strengthen the body's defences, improve immune function and reduce gut problems were either so general as to be inadmissible, or could not be shown to have the claimed effect."³

27. In September 2014, scientists at the University College of London published the results of an experiment examining the effects of commercially available probiotic products. The study found that the bacteria contained in Yakult failed to withstand the stomach's acidic environment or flourish in the small intestine.⁴ These findings run directly contrary to Defendant's health claims.

² See Scientific Opinion on the substantiation of a health claim related to *Lactobacillus casei* Shirota and maintenance of the upper respiratory tract defense against pathogens by maintaining immune defences pursuant to Article 13(5) of Regulation (EC) No 1924/2006, EFSA Journal 2010;8(10): 1860.

³ See Probiotic health claims ruled unproven, *The Guardian* (UK), (Oct. 19, 2010) (<http://www.guardian.co.uk/society/2010/oct/19/efsa-rules-probiotic-health-claims-unproven>).

⁴ See Probiotic drinks "don't do any good": Study finds "good" bacteria in many products does not even reach the small intestine, *Daily Mail*, (Sept. 11, 2014) (<http://www.dailymail.co.uk/health/article-2752798/The-probiotic-drinks-don-t-bring-benefits-Study-finds-good-bacteria-products-does-not-reach-small-intestine.html>).

28. During the Class Period, Plaintiff purchased Yakult multiple times, with his last purchase occurring in October 2014 at Ralphs, 910 Lincoln Boulevard, Venice, California. Prior to purchasing the Product, Plaintiff read and relied upon false and misleading statements that were prepared by and/or approved by Defendant and its agents and disseminated through the Yakult packaging. For each purchase, he understood he was paying for a probiotic beverage bringing benefits to his digestive system as well as overall health. During the Class Period, Plaintiff also viewed and relied on Yakult television commercials, which represented Yakult as a probiotic health drink. But for Defendant's misrepresentations, Plaintiff would not have purchased Yakult, and/or would not have paid a premium for Yakult over the price of other beverages that are not promoted as improving health. Plaintiff thus was damaged by Defendant's practice.

CLASS ACTION ALLEGATIONS

29. Plaintiff brings this action on behalf of herself and the following Class in accordance with Rule 23 of the Federal Rules of Civil Procedure.

All persons in the United States who purchased Yakult from its introduction in January 1, 2007 until the date notice is disseminated for personal or household use, and not for resale or distribution purposes. Specifically excluded from this Class are Defendant; the officers, directors, or employees of Defendant; any entity in which Defendant has a controlling interest; and any affiliate, legal representative, heir, or assign of Defendant. Also excluded are those who assert claims for personal injury as well as any federal, state, or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

1 30. Plaintiff also brings this action individually and as a class action
2 pursuant to Federal Rule of Civil Procedure 23 on behalf of all persons located
3 within the state of California and on behalf of all persons located within the states
4 with similar consumer protection laws, breach of express warranty laws and breach
5 of implied warranty laws.

6 31. The Classes defined above are individually so numerous that joinder
7 of all members is impracticable. While the exact number of members of the
8 Classes is unknown to Plaintiff at this time, based on the nature of the trade and
9 commerce involved, Plaintiff reasonably believes that there are thousands of
10 members in the Classes. Class Members are geographically dispersed throughout
11 the United States.

12 32. Questions of law and fact common to the Classes include, but are not
13 limited to:

- 14 a. Whether Defendant conveyed a class-wide message that
15 Yakult is beneficial to the digestive system, and/or a
16 class-wide message that Yakult promotes general human
17 health;
- 18 b. If so, whether Defendant's claims and messages were
19 material to a reasonable consumer;
- 20 c. If so, whether Defendant's claims and messages were
21 false (for example, whether Defendant's claims were
22 scientifically substantiated), or, if not literally false,
23 whether Defendant's claims were likely to deceive the
24 public;
- 25 d. Whether Defendant omitted any material information in
26 making the challenged claims; and
- 27 e. The proper method and measure of the Class's damages.

28 33. Common questions of law and fact exist as to all Class Members and
predominate over any questions affecting solely individual Class Members.

35. A class action is superior to other available methods for the fair and efficient adjudication of this controversy because joinder of all the Class Members is impracticable. The prosecution of separate actions by individual Class Members would impose heavy burdens upon the courts and Defendants, and would create a risk of inconsistent or varying adjudications of the questions of law and fact common to all of the Class Members. A class action would achieve substantial economies of time, effort and expense, and would assure uniformity of decision as to persons similarly situated without sacrificing procedural fairness. There will be no material difficulty in the management of this action as a class action on behalf of the Class Members.

19 36. Plaintiff repeats and incorporates by reference the allegations set forth
20 above as if fully set forth herein.

38. The acts, omissions, misrepresentations, practices, and non-disclosures of Defendant as alleged herein constitute “unlawful” business acts and practices in that Defendant’s conduct violates the Consumer Legal Remedies Act, and the California Sherman Food, Drug, and Cosmetic Law (“Sherman Law”), which incorporates all the regulations and requirements of the Federal Food, Drug,

1 and Cosmetic Act. Specifically, Defendant acted in contravention of the following
2 Sherman Law provisions:

- 3 • § 110100 (adopting all FDA regulations as state regulations);
- 4 • § 110290 (“In determining whether the labeling or advertisement of a
5 food . . . is misleading, all representations made or suggested by
6 statement, word, design, device, sound, or any combination of these
7 shall be taken into account. The extent that the labeling or advertising
8 fails to reveal facts concerning the food . . . or consequences of
9 customary use of the food . . . shall also be considered.”);
- 10 • § 110390 (“It is unlawful for any person to manufacture, sell, deliver,
11 hold, or offer for sale any food . . . that is falsely advertised.”);
- 12 • § 110398 (“It is unlawful for any person to advertise any food, drug,
13 device, or cosmetic that is adulterated or misbranded.”);
- 14 • § 110400 (“it is unlawful for any person to receive in commerce any
15 food . . . that is falsely advertised or to deliver or proffer for deliver
16 any such food “);
- 17 • § 110660 (“Any food is misbranded if its labeling is false or
18 misleading in any particular.”);
- 19 • § 110670 (“Any food is misbranded if its labeling does not confirm
20 with the requirements for nutrient content or health claims as set forth
21 in Section 403(r) (21 U.S.C. Sec. 343(r)) of the federal act and the
22 regulations adopted pursuant thereto.”);
- 23 • § 110680 (“Any food is misbranded if its labeling or packaging does
24 not conform to the requirements of Chapter 4 (commencing with
25 Section 110290).”);
- 26 • § 110705 (“Any food is misbranded if any word, statement, or other
27 information required pursuant to this part to appear on the label or
28 labeling is not prominently placed upon the label or labeling and in

1 terms as to render it likely to be read and understood by the ordinary
2 individual under customary conditions of purchase and use.”);

- 3 • § 110760 (“It is unlawful for any person to manufacture, sell, deliver,
4 hold, or offer for sale any food that is misbranded.”);
- 5 • § 110765 (“It is unlawful for any person to misbrand any food.”); and
- 6 • § 110770 (“It is unlawful for any person to receive in commerce any
7 food that is misbranded or to deliver or proffer for delivery any such
8 food.”).

9 39. By violating the California Unfair Competition Law, Defendant also
10 violated the common law of unfair competition.

11 40. Defendant leveraged their deception to induce Plaintiff and members
12 of the Classes to buy products that were of lesser value and quality than advertised.

13 41. Plaintiff suffered injury and fact and lost money or property as a result
14 of Defendant’s deceptive advertising: she was denied the benefit of the bargain in
15 purchasing Yakult. Had Plaintiff been aware of Defendant’s false and misleading
16 advertising tactics, she would have been willing to pay less than she did for Yakult,
17 or not purchase it at all. Moreover, had Defendant not engaged in the false and
18 misleading advertising tactics, Plaintiff and the members of the Class would have
19 paid less for Yakult because Defendant would not have been able to charge a
20 premium for the produce.

21 42. In accordance with Bus. & Prof. Code § 17203, Plaintiff seeks an
22 order enjoining Defendant from continuing to conduct business through unlawful,
23 unfair, and/or fraudulent acts and practices and to commence a corrective
24 advertising campaign.

25 43. Plaintiff also seeks an order for the restitution of all monies from the
26 sale of Yakult which were unjustly acquired through acts of unlawful, unfair,
27 and/or fraudulent competition.
28

1 **SECOND CLAIM FOR RELIEF**

2 ***Violations of the California Unfair Competition Law, Bus. & Prof. Code §§***
3 ***17200 et seq. (Unfair and Fraudulent)***

4 44. Plaintiff repeats and incorporates by reference the allegations set forth
5 above as if fully set forth herein.

6 45. Bus. & Prof. Code § 17200 prohibits any “unlawful, unfair or
7 fraudulent business act or practice.”

8 46. The false and misleading labeling and advertising of Yakult, as
9 alleged herein, constitutes ‘unfair’ business acts and practices because such
10 conduct is immoral, unscrupulous, and offends public policy. Further, the gravity
11 of Defendant’s conduct outweighs any conceivable benefit of such conduct.

12 47. The acts, omissions, misrepresentations, practices, and non-
13 disclosures of Defendant as alleged herein constitute “fraudulent” business acts
14 and practices because Defendant’s conduct is false and misleading to Plaintiff,
15 Class members, and the general public.

16 48. In accordance with Bus. & Prof. Code § 17203, Plaintiff seeks an
17 order enjoining Defendant from continuing to conduct business through unlawful,
18 unfair, and/or fraudulent acts and practices and to commence a corrective
19 advertising campaign.

20 49. Plaintiff also seeks an order for the restitution of all monies from the
21 sale of Yakult which were unjustly acquired through acts of unlawful, unfair,
22 and/or fraudulent competition.

23 **THIRD CLAIM FOR RELIEF**

24 ***Violation of the California False Advertising Law, Bus. & Prof. Code §§ 17500***
25 ***et seq.***

26 50. Plaintiff repeats and incorporates by reference the allegations set forth
27 above as if fully set forth herein.

- § 1770(a)(6): representing the subject of a transaction has been supplied in accordance with a previous representation when it has not.

57. As a result, Plaintiff and the Class members have suffered irreparable harm and are entitled to injunctive relief pursuant to Cal. Civ. Code § 1782(d).

58. Defendant's conduct described herein was longstanding, was done for profit as a deliberate corporate policy rather than an isolated incident, and was morally wrong, fraudulent, callous, and oppressive.

FIFTH CLAIM FOR RELIEF

Unjust Enrichment on Behalf of the Class, or in the Alternative, on Behalf of the California Class

59. Plaintiff repeats and incorporates by reference the allegations set forth above as if fully set forth herein.

60. Plaintiff brings this claim individually, as well as on behalf of members of the nationwide Class, under California law. Although there are numerous permutations of the elements of the unjust enrichment cause of action in the various states, there are few real differences. In all states, the focus of an unjust enrichment claim is whether the defendant was unjustly enriched. At the core of each state's law are two fundamental elements – the defendant received a benefit from the plaintiff and it would be inequitable for the defendant to retain that benefit without compensating the plaintiff. The focus of the inquiry is the same in each state. Since there is no material conflict relating to the elements of unjust enrichment between the different jurisdictions from which class members will be drawn, California law applies to the claims of the Class.

61. In the alternative, Plaintiff brings this claim individually as well as on behalf of the California Class.

62. At all times relevant hereto, Defendant deceptively labeled, marketed, advertised, and sold Yakult to Plaintiff and the Class.

63. Plaintiff and members of the Class conferred upon Defendant non-gratuitous payments for Yakult that they would not have due to Defendant's deceptive labeling, advertising, and marketing. Defendant accepted or retained the non-gratuitous benefits conferred by Plaintiff and members of the Class, with full knowledge and awareness that, as a result of Defendant's deception, Plaintiff and members of the Class were not receiving a product of the quality, nature, fitness, or value that had been represented by Defendant and reasonable consumers would have expected.

64. Defendant has been unjustly enriched in retaining the revenues derived from purchases of Yakult by Plaintiff and members of the Class, which retention under these circumstances is unjust and inequitable because Defendant misrepresented that Yakult has certain health benefits, when in fact they are not, which caused injuries to Plaintiff and members of the Class because they paid a price premium due to the mislabeling of Yakult.

65. Retaining the non-gratuitous benefits conferred upon Defendant by Plaintiff and members of the Class under these circumstances made Defendant's retention of the non-gratuitous benefits unjust and inequitable. Thus, Defendant must pay restitution to Plaintiff and members of the Class for its unjust enrichment, as ordered by the Court.

SIXTH CLAIM FOR RELIEF

Plaintiff, on Behalf of Himself, the California Class and Classes in the States with Similar Laws, Alleging Breach of Express Warranty

66. Plaintiff repeats and incorporates by reference the allegations set forth above as if fully set forth herein.

67. Plaintiff brings this Count individually under the laws of the state where he purchased Yakult and on behalf of: (a) all other persons who purchased

1 Yakult in the same State; and (b) all other persons who purchased Yakult in States
2 having similar laws regarding express warranty.

3 68. Defendant's representations, as described herein, are affirmations by
4 Defendant that Yakult is a probiotic beverage with certain health benefits.
5 Defendant's representations regarding Yakult are made to Plaintiff and the other
6 members of the Classes at the point of purchase and are part of the description of
7 the goods. Those promises constituted express warranties and became part of the
8 basis of the bargain, between Defendant on the one hand, and Plaintiff and the
9 Classes on the other.

10 69. In addition, or in the alternative, Defendant made each of its above-
11 described representations to induce Plaintiff and the Classes to rely on such
12 representations, and they each did so rely on Defendant's representations as a
13 material factor in their decisions to purchase Yakult. Plaintiff and other members
14 of the Classes would not have purchased Yakult but for these representations and
15 warranties.

16 70. Yakult did not, in fact, meet the representations Defendant made
17 about Yakult, as described herein.

18 71. At all times relevant to this action, Defendant falsely represented that
19 Yakult was a yogurt beverage with certain health benefits, when in fact it did not
20 have such health benefits.

21 72. At all times relevant to this action, Defendant made false
22 representations in breach of the express warranties and in violation of state express
23 warranty laws, including:

- 24
- 25 a. Alaska St. §45.02.313;
 - 26 b. Ariz. Rev. Stat. Ann. §47-2313;
 - 27 c. Ark. Code Ann. §4-2-313;
 - 28 d. Cal. Com. Code §2313;

- e. Colo. Rev. Stat. §4-2-313;
- f. Conn. Gen. Stat. Ann. §42a-2-313;
- g. D.C. Code §28:2-313;
- h. Fla. Stat. §672.313;
- i. Haw. Rev. Stat. §490:2-313;
- j. 810 Ill. Comp. Stat. 5/2-313;
- k. Ind. Code §26-1-2-313;
- l. Kan. Stat. Ann. §84-2-313;
- m. La. Civ. Code. Ann. art. 2520;
- n. Maine Rev. Stat. Ann. 11 §2-313;
- o. Mass. Gen. Laws Ann. 106 §2-313;
- p. Minn. Stat. Ann. §336.2-313;
- q. Miss. Code Ann. §75-2-313;
- r. Mo. Rev. Stat. §400.2-313;
- s. Mont. Code Ann. §30-2-313;
- t. Neb. Rev. Stat. §2-313;
- u. Nev. Rev. Stat. §104.2313;
- v. N.H. Rev. Stat. Ann. §382-A:2-313;
- w. N.J. Stat. Ann. §12A:2-313;
- x. N.M. Stat. Ann. §55-2-313;
- y. N.Y. U.C.C. Law §2-313;
- z. N.C. Gen. Stat. Ann. §25-2-313;
- aa. Okla. Stat. Ann. tit. 12A, §2-313;
- bb. Or. Rev. Stat. §72.3130;
- cc. Pa. Stat. Ann. tit. 13, §2313;
- dd. R.I. Gen. Laws §6A-2-313;
- ee. S.C. Code Ann. §36-2-313;
- ff. S.D. Codified Laws. §57A-2-313;

- 1 gg. Tenn. Code Ann. §47-2-313;
2 hh. Tex. Bus. & Com. Code Ann. §2.313;
3 ii. Utah Code Ann. §70A-2-313;
4 jj. Vt. Stat. Ann. tit. 9A§2-313;
5 kk. Wash. Rev. Code §62A.2-313;
6 ll. W. Va. Code §46-2-313;
7 mm. Wyo. Stat. Ann. §34.1-2-313;
8

9 73. The above statutes do not require privity of contract in order to
10 recover for breach of express warranty.

11 74. As a proximate result of this breach of warranty by Defendant,
12 Plaintiff and other members of the Classes have been damaged in an amount to be
13 determined at trial because: (a) they paid a price premium due to the deceptive
14 labeling of Yakult; and (b) Yakult did not have the attributes, characteristics,
15 nutritional value, health qualities, or value promised.

16 75. Wherefore, Plaintiff and the Classes demand judgment against
17 Defendant for compensatory damages, plus interest, costs, and such additional
18 relief as the Court may deem appropriate or to which Plaintiff and the Classes may
19 be entitled.

20 SEVENTH CLAIM FOR RELIEF

21 *Plaintiff, on Behalf of Himself, the California Class, and Classes in the States*
22 *with Similar Laws, Alleging Breach of Implied Warranty*

23 76. Plaintiff repeats and incorporates by reference the allegations set forth
24 above as if fully set forth herein.

25 77. Plaintiff brings this Count individually under the laws of the state
26 where he purchased Yakult and on behalf of: (a) all other persons who purchased
27
28

1 Yakult in the same State; and (b) all other persons who purchased Yakult in States
2 having similar laws regarding implied warranties.

3 78. The Uniform Commercial Code §2-314 provides that unless excluded
4 or modified, a warranty that the goods shall be merchantable is implied in a
5 contract for their sale if the seller is a merchant with respect to goods of that kind.
6 This implied warranty of merchantability acts as a guarantee by the seller that his
7 goods are fit for the ordinary purposes for which they are to be used.

8 79. Defendant developed, manufactured, advertised, marketed, sold,
9 and/or distributed Yakult and represented that Yakult was fit for a particular use,
10 specifically that the Product could be used as probiotic beverage with certain
11 health benefits. Contrary to such representations, Defendant failed to disclose that
12 Yakult does not benefit the digestive system or human health more generally.

13 80. At all times, the following states listed below, including the District of
14 Columbia, have codified and adopted the provisions of the Uniform Commercial
15 Code governing the implied warranty of merchantability:

- 16 a. Ala. Code §7-2-314;
- 17 b. Alaska Stat. §45.02.314;
- 18 c. Ariz. Rev. Stat. Ann. §47-2314;
- 19 d. Ark. Code Ann. §4-2-314;
- 20 e. Cal. Com. Code §2314;
- 21 f. Colo. Rev. Stat. §4-2-314;
- 22 g. Conn. Gen. Stat. Ann. §42a-2-314;
- 23 h. Del. Code Ann. tit. 6 §2-314;
- 24 i. D.C. Code §28:2-314;
- 25 j. Fla. Stat. §672.314;
- 26 k. Ga. Code Ann. §11-2-314;
- 27 l. Haw. Rev. Stat. §490:2-314;
- 28 m. Idaho Code §28-2-314;

- n. 810 Ill. Comp. Stat. Ann. 5/2-314;
- o. Ind. Code Ann. §26-1-2-314;
- p. Iowa Code Ann. §554.2314;
- q. Kan. Stat. Ann. §84-2-314;
- r. Ky. Rev. Stat. Ann. §355.2-314;
- s. La. Civ. Code Ann. art. §2520;
- t. Me. Rev. Stat. Ann. 11 §2-314;
- u. Md. Code Ann. Com. Law §2-314;
- v. Mass. Gen. Laws Ch. 106 §2-314;
- w. Mich. Comp. Laws Ann. §440.2314;
- x. Minn. Stat. Ann. §336.2-314;
- y. Miss. Code Ann. §75-2-314;
- z. Mo. Rev. Stat. §400.2-314;
- aa. Mont. Code Ann. §30-2-314;
- bb. Nev. Rev. Stat. §104.2314;
- cc. N.H. Rev. Stat. Ann. §382-A:2-314;
- dd. N.J. Stat. Ann. §12A:2-314;
- ee. N.M. Stat. Ann. §55-2-314;
- ff. N.Y. U.C.C. Law §2-314;
- gg. N.C. Gen. Stat. Ann. §25-2-314;
- hh. N.D. Cent. Code §41-02-314;
- ii. Ohio Rev. Code Ann. §1302.27;
- jj. Okla. Stat. Ann. tit. 12A §2-314;
- kk. Or. Rev. Stat. §72.3140;
- ll. Pa. Stat. Ann. tit. 13 §2314;
- mm. R.I. Gen. Laws §6A-2-314;
- nn. S.C. Code Ann. §36-2-314;
- oo. S.D. Codified Laws §57A-2-314;

- 1 pp. Tenn. Code Ann. §47-2-314;
- 2 qq. Tex. Bus. & Com. Code Ann. §2-314;
- 3 rr. Utah Code Ann. §70A-2-314;
- 4 ss. Va. Code Ann. §8.2-314;
- 5 tt. Vt. Stat. Ann. tit. 9A §2-314;
- 6 uu. W. Va. Code §46-2-314;
- 7 vv. Wash. Rev. Code §62A 2-314;
- 8 ww. Wis. Stat. Ann. §402.314; and
- 9 xx. Wyo. Stat. Ann. §34.1-2-314.

10 81. As developer, manufacturer, producer, advertiser, marketer, seller
11 and/or distributor of sweetening products, Defendant is a “merchant” within the
12 meaning of the various states’ commercial codes governing the implied warranty
13 of merchantability.

14 82. Further, Defendant is a merchant with respect to Yakult. Defendant
15 developed, manufactured, produced, advertised, marketed, sold, and/or distributed
16 Yakult and represented to Plaintiff and the Classes that it developed Yakult as a
17 probiotic beverage providing certain health benefits. Further, Defendant, by
18 selling Yakult to Plaintiff and the Classes has held itself out as a retailer of the
19 product and, in fact, has derived a substantial amount of revenues from the sale of
20 the product.

21 83. Yakult can be classified as “goods,” as defined in the various states’
22 commercial codes governing the implied warranty of merchantability.

23 84. As a merchant of Yakult, Defendant knew that purchasers relied upon
24 them to develop, manufacture, produce, sell, and distribute a product that could be
25 used as a probiotic beverage providing certain health benefits, as promised.

26 85. Defendant developed, manufactured, produced, sold, and distributed
27 Yakult to consumers such as Plaintiff and the Classes. It knew that the product
28 would be used as a probiotic beverage providing certain health benefits.

1 86. Defendant specifically represented in its labeling of the product that it
2 is a probiotic beverage providing certain health benefits, as described herein.

3 87. At the time that Defendant developed, manufactured, sold, and/or
4 distributed Yakult, Defendant knew the purpose for which the product was
5 intended and impliedly warranted that the product was of merchantable quality and
6 was fit for its ordinary purpose – a probiotic beverage providing certain health
7 benefits.

8 88. Defendant breached its implied warranties in connection with the sale
9 of Yakult to Plaintiff and members of the Classes. The product was not fit for its
10 ordinary purposes and intended use as a probiotic beverage providing certain
11 health benefits, because Yakult does not actually provide any health benefits.

12 89. Defendant had actual knowledge that Yakult does not actually provide
13 any health benefits and Plaintiff therefore was not required to notify Defendant of
14 its breach. If notice is required, Plaintiff and the Classes adequately have provided
15 Defendant of such notice through the filing of this lawsuit.

16 90. As a direct and proximate result of Defendant's breach of implied
17 warranties, Plaintiff and other members of the Classes have been injured. Plaintiff
18 and the other members of the Classes would not have purchased Yakult but for
19 Defendant's representations and warranties. Defendant misrepresented the
20 character of the product, which caused injuries to Plaintiff and the other members
21 of the Classes because either they paid a price premium due to the deceptive
22 labeling or they purchased products that were not of a character and fitness as
23 promised and therefore had no value to Plaintiff and the other members of the
24 Classes.

EIGHTH CLAIM FOR RELIEF

***Plaintiff, on Behalf of Himself and Classes in the States with Similar Laws,
Alleging Violation of the Consumer Fraud Laws of the Various States***

91. Plaintiff repeats and incorporates by reference the allegations set forth above as if fully set forth herein.

92. Plaintiff brings this Count individually under the laws of the state where he purchased Yakult and on behalf of all other persons who purchased Yakult in States having similar laws regarding consumer fraud and deceptive trade practices.

93. Plaintiff and each of the other members of the Classes are consumers, purchasers, or other persons entitled to the protection of the consumer protection laws of the State in which they purchased the Product.

94. The consumer protection laws of the State in which Plaintiff and the other members of the Classes purchased the Product declare that unfair or deceptive acts or practices, in the conduct of trade or commerce, are unlawful.

95. Forty States and the District of Columbia have enacted statutes designed to protect consumers against unfair, deceptive, fraudulent, and unconscionable trade and business practices and false advertising and that allow consumers to bring private and/or class actions. These statutes are found at:

- a. Alabama Deceptive Trade Practices Act, Ala. Code §8-19-1 *et seq.*;
- b. Alaska Unfair Trade Practices and Consumer Protection Act, Alaska Code §45.50.471 *et seq.*;
- c. Arkansas Deceptive Trade Practices Act, Ark. Code Ann. §4-88-101 *et seq.*;
- d. California Consumer Legal Remedies Act, Cal. Civ. Code §1750 *et seq.*, and California's Unfair Competition Law, Cal. Bus. & Prof. Code §17200 *et seq.*;

- 1 e. Colorado Consumer Protection Act, Colo. Rev. Stat. §6-1-101 *et seq.*;
- 2 f. Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §42-110a *et*
- 3 *seq.*;
- 4 g. Delaware Deceptive Trade Practices Act, Del. Code tit. 6§2511 *et*
- 5 *seq.*;
- 6 h. District of Columbia Consumer Protection Procedures Act, D.C. Code
- 7 §28 3901 *et seq.*;
- 8 i. Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. Ann.
- 9 §501.201 *et seq.*;
- 10 j. Georgia Fair Business Practices Act, Ga. Code Ann. §10-1-390 *et*
- 11 *seq.*;
- 12 k. Hawaii Unfair and Deceptive Practices Act, Hawaii Revised Statutes
- 13 §480-1 *et seq.*, and Hawaii Uniform Deceptive Trade Practices Act, Haw. Rev.
- 14 Stat. §481A-1 *et seq.*;
- 15 l. Idaho Consumer Protection Act, Idaho Code Ann. §48-601 *et seq.*;
- 16 m. Illinois Consumer Fraud and Deceptive Business Practices Act, 815
- 17 Ill. Comp. Stat. Ann. 505/1 *et seq.*;
- 18 n. Kansas Consumer Protection Act, Kan. Stat. Ann §50 626 *et seq.*;
- 19 o. Kentucky Consumer Protection Act, Ky. Rev. Stat. Ann. §367.110 *et*
- 20 *seq.*, and the Kentucky Unfair Trade Practices Act, Ky. Rev. Stat. Ann §365.020 *et*
- 21 *seq.*;
- 22 p. Louisiana Unfair Trade Practices and Consumer Protection Law, La.
- 23 Rev. Stat. Ann. §51:1401 *et seq.*;
- 24 q. Maine Unfair Trade Practices Act, Me. Rev. Stat. tit. 5 §205A *et seq.*,
- 25 and Maine Uniform Deceptive Trade Practices Act, Me. Rev. Stat. Ann. tit. 10,
- 26 §1211 *et seq.*,
- 27 r. Massachusetts Unfair and Deceptive Practices Act, Mass. Gen. Laws
- 28 ch. 93A;

1 s. Michigan Consumer Protection Act, Mich. Comp. Laws §445.901 *et*
2 *seq.*;

3 t. Minnesota Prevention of Consumer Fraud Act, Minn. Stat.
4 Ann. §325F.68 *et seq.*, and Minnesota Uniform Deceptive Trade Practices Act,
5 Minn. Stat. §325D.43 *et seq.*;

6 u. Mississippi Consumer Protection Act, Miss. Code Ann. §§75-24-1 *et*
7 *seq.*;

8 v. Missouri Merchandising Practices Act, Mo. Rev. Stat. §407.010 *et*
9 *seq.*;

10 w. Montana Unfair Trade Practices and Consumer Protection Act, Mont.
11 Code Ann. §30-14-101 *et seq.*;

12 x. Nebraska Consumer Protection Act, Neb. Rev. Stat. §59-1601 *et seq.*,
13 and the Nebraska Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. §87-301
14 *et seq.*;

15 y. Nevada Trade Regulation and Practices Act, Nev. Rev. Stat.
16 §598.0903 *et seq.*;

17 z. New Hampshire Consumer Protection Act, N.H. Rev. Stat. §358-A:1
18 *et seq.*;

19 aa. New Jersey Consumer Fraud Act, N.J. Stat. Ann. §56:8 1 *et seq.*;

20 bb. New Mexico Unfair Practices Act, N.M. Stat. Ann. §57 12 1 *et seq.*;

21 cc. New York Deceptive Acts and Practices Act, N.Y. Gen. Bus. Law
22 §349 *et seq.*;

23 dd. North Dakota Consumer Fraud Act, N.D. Cent. Code §51 15 01 *et*
24 *seq.*;

25 ee. Ohio Consumer Sales Practices Act, Ohio Rev. Code Ann. §1345.02
26 and 1345.03; Ohio Admin. Code §109:4-3-02, 109:4-3-03, and 109:4-3-10;

27 ff. Oklahoma Consumer Protection Act, Okla. Stat. tit. 15 §751 *et seq.*;

28 gg. Oregon Unfair Trade Practices Act, Ore. Rev. Stat §646.608(e) & (g);

1 hh. Rhode Island Unfair Trade Practices And Consumer Protection Act,
2 R.I. Gen. Laws §6-13.1-1 *et seq.*;

3 ii. South Carolina Unfair Trade Practices Act, S.C. Code Ann. §39-5-10
4 *et seq.*;

5 jj. South Dakota's Deceptive Trade Practices and Consumer Protection
6 Law, S.D. Codified Laws §§37 24 1 *et seq.*;

7 kk. Tennessee Consumer Protection Act, Tenn. Code Ann. §47-18-101 *et*
8 *seq.*;

9 ll. Vermont Consumer Fraud Act, Vt. Stat. Ann. tit. 9, §2451 *et seq.*;

10 mm. Washington Consumer Fraud Act, Wash. Rev. Code §19.86.010 *et*
11 *seq.*;

12 nn. West Virginia Consumer Credit and Protection Act, West Virginia
13 Code §46A-6-101 *et seq.*; and

14 oo. Wisconsin Deceptive Trade Practices Act, Wis. Stat. §100.18 *et seq.*

15 96. Yakult constitutes a product to which these consumer protection laws
16 apply.

17 97. In the conduct of trade or commerce regarding its production,
18 marketing, and sale of the product, Defendant engaged in one or more unfair or
19 deceptive acts or practices, including, but not limited to, uniformly representing to
20 Plaintiff and each member of the Classes by means of its packaging and labeling of
21 Yakult that it is a probiotic beverage providing certain health benefits.

22 98. Defendant's representations and omissions were false, untrue,
23 misleading, deceptive, and/or likely to deceive.

24 99. Defendant knew, or should have known, that its representations and
25 omissions were false, untrue, misleading, deceptive, and/or likely to deceive.

26 100. Defendant used or employed such deceptive and unlawful acts or
27 practices with the intent that Plaintiff and members of the Classes rely thereon.

28 101. Plaintiff and the other members of the Classes did so rely.

1 E. that the Court order Defendant to implement whatever measures are
2 necessary to remedy the unlawful, unfair, or fraudulent business acts or practices,
3 untrue and misleading advertising, and other violations of law described in this
4 Complaint;

5 F. that the Court order Defendant to notify each and every individual
6 and/or business who purchased Yakult of the pendency of the claims in this action
7 in order to give such individuals and businesses an opportunity to obtain restitution
8 from Defendant;

9 G. that the Court order Defendant to pay restitution to restore to all
10 affected persons all funds acquired by means of any act or practice declared by this
11 Court to be an unlawful, unfair, or a fraudulent business act or practice, untrue or
12 misleading labeling, advertising, and marketing, plus pre- and post-judgment
13 interest thereon;

14 H. that the Court order Defendant to disgorge all monies wrongfully
15 obtained and all revenues and profits derived by Defendant as a result of its acts or
16 practices as alleged in this Complaint;

17 I. that the Court award damages to Plaintiff and the Classes;

18 J. the common fund doctrine, and/or any other appropriate legal theory;
19 and

20 K. that the Court grant such other and further relief as may be just and
21 proper.

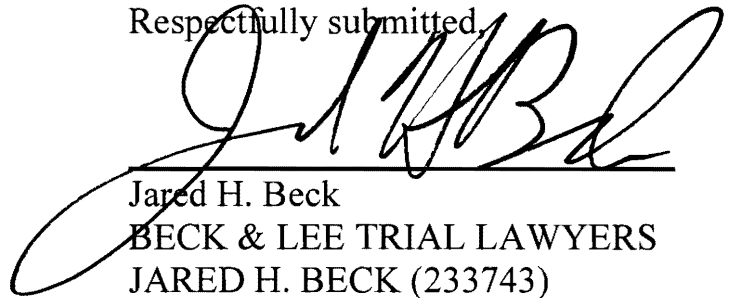
22 **DEMAND FOR JURY TRIAL**

23 Plaintiff hereby demands trial by jury in this action on all issues so triable.

24 *~signature page follows~*
25
26
27
28

1 DATED: January 27, 2015

2 Respectfully submitted,

3 

4 Jared H. Beck

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